

2. Claimant received authorized medical treatment for this injury from Dr. David M. Smith. Treatment consisted of the examinations by Dr. Smith and physical therapy. Claimant was diagnosed with a right lumbosacral strain, right buttock and piriformis pain and right shoulder strain. She was released to return to work without restrictions, and with no permanent/partial impairment on February 19, 1999. Shortly thereafter claimant went to work for Beauty Warehouse. Her job as a retail sales associate required that she be on her feet all day. Her regular job duties included stocking shelves and moving merchandise

within the store. Claimant did not make any complaints or seek additional treatment while employed by Beauty Warehouse until June 4, 1999, when she was re-examined by Dr. Daniel D. Zimmerman at the request of her attorney. Claimant attributed her pain to standing on her feet all day at Beauty Warehouse.

3. Claimant testified that her work activity at Beauty Warehouse worsened her low back, right hip, buttock and leg pain until she was forced to quit that job in late July 1999 due to pain. She now works part time for Salon Service Group doing less physically demanding work. Nevertheless, prolonged sitting or standing aggravates her condition.

4. Eventually respondent referred claimant to Dr. Jeffrey T. MacMillan. He prescribed anti-inflammatories and a TENS unit. In a September 3, 1999 letter to respondent's counsel, Dr. MacMillan attributes claimant's current symptoms to her current employment.

Ms. Neaderheiser's current complaints appear to be more activity related, and due to her current employment, rather than related to her reported fall of 12/20/98. The TENS unit and anti-inflammatory which I suggested are for treatment of her current symptoms, and should not be considered related to her work injury.

CONCLUSIONS OF LAW

An ALJ's preliminary award under K.S.A. 1999 Supp. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.³ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

¹ K.S.A. 1999 Supp. 44-551(b)(2)(A).

² K.S.A. 1999 Supp. 44-534a(a)(2).

³ K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

more probably true than not true on the basis of the whole record."⁴ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁵

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁶ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁷ Based upon the current record, the Appeals Board finds that claimant's work at Beauty Warehouse following her employment by The Bristol caused an aggravation of claimant's injury and was the cause of claimant's condition at the time of the preliminary hearing. Claimant's current condition, therefore, is not compensable as a direct and natural consequence of the original December 20, 1998 injury.

Respondent, therefore, is not held liable for claimant's medical treatment after her release by Dr. Smith, when claimant said her condition had gotten better, and after her employment with Beauty Warehouse. Since the ALJ's Preliminary Decision in this case is prospective and deals only with the cost of medical treatment from the date of the Preliminary Decision, the assessment of liability against respondent and its insurance carrier was not proper and should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision dated January 20, 2000 entered by Administrative Law Judge Robert H. Foerschler should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: James R. Shetlar, overland Park, KS

⁴ K.S.A. 1999 Supp. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 1999 Supp. 44-501(g).

⁶ Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

⁷ Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

D'Ambra M. Howard, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director